SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Armoyan v. Armoyan, 2014 NSSC 30

Date: 20140124
Docket: SFHD - 1201-065036
Registry: Halifax

Between:

Lisa Armoyan

Applicant

v.

Verge Armoyan

Respondent

Judge:	The Honourable Justice Theresa M. Forgeron
Heard:	January 15, 2014, in Halifax, Nova Scotia
Oral Decision:	January 15, 2014
Written Decision:	January 24, 2014
Counsel:	Mary Jane McGinty and Christine Doucet, for the applicant

By the Court:

[1] **Introduction**

[2] Lisa and Vrege Armoyan are divorced spouses. Despite their divorce, property division issues remain outstanding by virtue of the decision of the Nova Scotia Court of Appeal, reported at 2013 NSCA 99. Trial dates have yet to be scheduled.

[3] Ms. Armoyan filed an *ex parte* motion for a preservation order pending final disposition. I recently was assigned carriage of this file. The motion was heard on January 15, 2014. I had the benefit of reviewing the following:

- the affidavit and undertaking of Ms. Armoyan;
- the affidavit of Ms. McGinty which contained a number of exhibits, including the sworn statement of Sabrina Tremblay, who is a lawyer with National Bank Financial;
- the written materials filed in support of the motion;
- the written decisions of the Nova Scotia Court of Appeal involving the parties; and
- the oral submissions of Ms. Doucet.

[4] **Issues**

[5] In ruling on the motion, this court will determine the following three issues:

- Should the motion be heard on an *ex parte* basis?
- Should a preservation order be granted?
- If so, what terms and conditions are to be applied to the preservation order?

[6] **Analysis**

[7] **Should the motion be heard on an *ex parte* basis?**

[8] The court's authority to proceed on an *ex parte* basis is found in Rule 22.03(1). Rule 22.03(1)(e) is relevant. This rule permits an *ex parte* application where there are circumstances of sufficient gravity. Rule 22.03(1)(e) states as follows:

> 22.03 - *Ex parte* motion
>
> (1) A party may make an *ex parte* motion in one of the following circumstances:
> ....
> (e) there are circumstances of sufficient gravity to justify making a motion without notice, for which examples are listed in Rule 22.03(2).

[9] Ms. Armoyan relies upon the example set out in Rule 22.03(2)(c) in support of her position. This rule states as follows:

> (2) Each of the following is an example of circumstances of sufficient gravity to justify an *ex parte* motion:
> ....
> (c) notice will likely lead to destruction of evidence or other serious loss of property, and an *ex parte* order will likely avoid the destruction or loss;

[10] In support of her position, Ms. Armoyan argues that Mr. Armoyan will remove all assets from the court's jurisdiction if he is given notice. Ms. Armoyan relies upon Mr. Armoyan's past and current conduct in support of her argument.

[11] I have determined that Ms. Armoyan's motion should go forward on an *ex parte* basis. The particulars described in the material before me prove circumstances of sufficient gravity to proceed without notice. I reach this conclusion based upon the following facts:

- Mr. Armoyan conveyed the former matrimonial home post separation and intended to apply the proceeds to his living expenses and invest the rest in China, India, the Middle East, and the United States.

- Mr. Armoyan transferred $23 million to the Middle East - to Lebanon and Syria.

- Mr. Armoyan transferred a yacht to Lebanon.

- Mr. Armoyan is in arrears of maintenance as ordered by the Florida courts, and despite the decision of the Nova Scotia Court of Appeal, confirming the jurisdiction of the Florida courts to determine those issues.

- Mr. Armoyan has not paid the cost award ordered by the Nova Scotia Court of Appeal, in the amount of $306,000, which costs were payable forthwith.

- According to Ms. Armoyan, Mr. Armoyan has recently changed the process through which he pays child support.

- Ms. Tremblay's statement indicates that more of Mr. Armoyan's assets were recently removed from National Bank Financial, and the assets which remain have a minimal balance, as of December 17, 2013.

- The Nova Scotia Court of Appeal held, in part, as follows at para 285 of its decision reported at 2013 NSCA 99:

> Ms. Armoyan has accumulated staggering legal accounts, responding to Mr. Armoyan's initiatives, while Mr. Armoyan has defaulted in his court-ordered reimbursement of her costs after his initiatives were rejected. Meanwhile, the stays and delays that accompanied his Florida initiatives have well served Mr. Armoyan, who has used the time to avoid support payments, convey assets to relatives and move tens of millions of dollars from Nova Scotia to the Middle East.

[12] The totality of these factors produce circumstances of sufficient gravity to displace notice to Mr. Armoyan. Based upon the evidence before me, Ms. Armoyan has proven that notice could trigger the further movement of any remaining assets from the jurisdiction of the court. Such a loss would have a profound impact on Ms. Armoyan, personally, and in her capacity as a custodial parent.

[13] Ms. Armoyan has no control over assets held in the name of Mr. Armoyan. Ms. Armoyan's right to property crystallized at the time of separation, although the quantification of her property interests has yet to be decided. Mr. Armoyan has not paid the child and spousal support as ordered. Significant maintenance arrears have accumulated. It is important that Ms. Armoyan have access to more than a paper judgement at the end of the day. The motion to proceed on an *ex parte* basis is therefore granted.

[14] **Should a preservation order be granted?**

[15] Ms. Armoyan relies upon s.19 of the *Matrimonial Property Act* and Rule 42 in support of her request for a preservation order. I will address each of these claims in the order presented.

[16] **Section 19**

[17] Section 19 of the *Matrimonial Property Act* provides the court with the jurisdiction to make such interim orders it considers necessary for the proper application of the *Act*, pending disposition.

[18] This section has not been the subject of many reported decisions in Nova Scotia, although I am familiar with oral decisions on point. The reported Nova Scotia cases which I have been able to locate, are not relevant to the preservation motion before me. The reported s.19 cases deal with the interim division of matrimonial assets, such as found in **Luke v. Luke**, 2003 NSSF 12; and **Mollins Estate v. Mollins Estate**, (1996), 152 N.S.R.(2d) 386 (S.C.T.D.); or the granting of interim exclusive possession of the matrimonial home, such as found in **Cull v. Cull** 1994 CarswellNS 501 (S.C.T.D.).

[19] A comparable provision of s.19 of the Nova Scotia *Matrimonial Property Act* is found in s. 28 of the 1979 *Matrimonial Property Act* of Newfoundland. Two decisions of the Supreme Court of Newfoundland discuss the use of s. 28 in the context of a preservation order.

[20] In **Hart v. Hart**, 1984 52 Nfl. & P.E.I.R. 160 (S.C. Nfld, U.F.C.), Cameron, J. granted a preservation order against a company owned and operated by the husband. The court ordered the preservation of the corporate assets, but permitted the company to continue to trade and to continue to pay legitimate creditors. The court also noted the distinction between family and non-family assets.

[21] In **Whelan v. Whelan**, 1986 62 Nfld. & P.E.I.R. 29 (S.C.Nfld,U.F.C.), Noonan, J. refused to grant an interim preservation order because of a lack of evidence. Although denying the motion, the court nonetheless held that s. 28 of the 1979 *Matrimonial Property Act* of Newfoundland should be invoked when there was a concern that an asset may be dissipated prior to the final order issuing, at para 10, wherein Noonan, J. states as follows:

> Interim relief under section 28 may be granted where the court considers an order to be "necessary for the proper application of this part." In my opinion the section is intended to be used in situations where there is concern that an asset, which is the subject of the action, may be disposed of or dealt with in such a fashion that when the order for division is made the subject matter is no longer available. [See also **Hart v. Hart** (1984), 43 R.F.L. (2d) 36per Cameron, J. (S.C. Nfld, U.F.C.)].

[22] I concur with these comments. Section 19 of the *Matrimonial Property Act* of Nova Scotia provides the court with the jurisdiction to grant such interim orders as it considers necessary for the proper application of the *Act* pending disposition. Injunctive relief is appropriate pursuant to s. 19 of the *Matrimonial Property Act* for the following reasons:

- An application for relief under the *Matrimonial Property Act* was filed by Mr. Armoyan in 2010. There has been no adjudication of this application. No trial dates have been assigned.

- Millions of dollars in assets have been removed from this court's jurisdiction.

- Mr. Armoyan is not responding to some court orders, including the payment of costs from the Nova Scotia Court of Appeal.

- Ms. Armoyan will likely receive a property award at the conclusion of the application for relief. Ms. Armoyan is entitled to more than a paper judgement.

[23] In summary, and given such circumstances, an interim preservation order is necessary to ensure that the objectives stated in the *Act's* preamble, and the substantive rights stated within its legislative provisions are achieved.

[24] *Rule 42*

[25] Ms. Armoyan relies upon Rule 42.01 which permits a party to make application for a preservation order respecting property claimed in the proceeding or assets available to satisfy a judgement claimed in a proceeding. Rule 42.01 states:

> **Scope of Rule**
>
> 42 (1) A party to a proceeding may make a motion for an order preserving any of the following, in accordance with this Rule:
>
> (a) evidence that is relevant to an issue in the proceeding;
>
> (b) property claimed in the proceeding;
>
> (c) assets that would be available to satisfy a judgment claimed in the proceeding.

[26] The three part test for interlocutory injunctive relief was pronounced in **RJR- MacDonald Inc. v. Canada (Attorney General)**,1994 CarswellQue 120, [1994] 1 S.C.R. 311 (S.C.C.). Under this test, Ms. Armoyan must establish that:

- there is a serious issue to be tried;

- irreparable harm will be suffered if the injunction is not granted; and
- the balance of convenience favours the granting of the relief sought.

[27] *Serious Issue*

[28] Ms. Armoyan has established that there is a serious issue to be tried. The Court of Appeal decision discusses the issue of the marriage contract. Ms. Armoyan's claim in respect of this issue is neither frivolous, nor vexatious. There is a claim that the contract is unconscionable for the reasons stated in the appeal decision. If she is successful, Ms. Armoyan is entitled to relief under the provisions of the *Matrimonial Property Act*.

[29] Further, and as a result, there is a serious question as to whether Mr. Armoyan should be restrained from removing assets or disposing of assets in order to satisfy judgements against him. This question is not frivolous, nor vexatious in light of the evidence that substantial assets have been removed from the jurisdiction and certain judgements have not been paid. The Court of Appeal held that Mr. Armoyan's conduct had a negative impact upon Ms. Armoyan.

[30] In summary, Ms. Armoyan has met the first part of the test for injunctive relief.

[31] *Irreparable Harm*

[32] At this stage, I must determine if a preservation order is necessary to avoid irreparable injury, which cannot be compensated or remedied in any other way than through an interlocutory injunction. Mere inconvenience is insufficient.

[33] Ms. Armoyan has proven this part of the test. A preservation order is necessary to avoid irreparable injury, which cannot be compensated or remedied in any other way than through an injunction. Mr. Armoyan has move substantial assets out of the court's reach and owes Ms. Armoyan significant moneys pursuant to outstanding judgements. If a preservation order is not granted, Mr. Armoyan will not be prevented from continuing to remove the remaining assets out of the jurisdiction. If this occurs, Mr. Armoyan will be judgement proof in Nova Scotia.

[34] Ms. Armoyan satisfied the second part of the test.

[35] *Balance of Convenience*

[36] At this stage, I must determine who will suffer the greater harm by the refusal, or by the granting of the injunctive relief.

[37] I find that Ms. Armoyan has proven this stage of the test. Ms. Armoyan would suffer greater harm by the refusal of the relief sought, than would Mr. Armoyan, if the relief was granted. I draw this conclusion from the fact that Mr. Armoyan has access to the substantial assets which he transferred out of province, this includes the millions in cash which he moved to the Middle East.

[38] In contrast, Ms. Armoyan has spent significant resources attempting to collect maintenance, retroactive and ongoing, and costs, including the $306,000 award due pursuant to her appeal. Ms. Armoyan has not yet been successful in her efforts to collect judgements outstanding. If there are no assets left in Nova Scotia, Ms. Armoyan's ability to provide for herself and her children will be severely compromised.

[39] The balance of convenience favours Ms. Armoyan.

[40] *Summary*

[41] Ms. Armoyan has proven that an *ex parte* preservation order should be granted. There are two basis for so doing. The first is s. 19 of the *Matrimonial Property Act* because such an award is necessary for the proper application of the *Act*. Second, a preservation order should be granted based upon Rule 42 and the injunctive relief principles which have been reviewed.

[42] I acknowledge that I have heard from one party only. Mr. Armoyan's evidence should also be heard. He may wish to provide evidence to the court at a rehearing. The rehearing, which is not an appeal, could result in the court setting aside, varying, or continuing the *ex parte* order. The current order is meant to be a temporary order pending further review, after the filing of a notice by Mr. Armoyan seeking a rehearing as contemplated in Rule 22.06.

[43] **If so, what terms and conditions are to be applied to the preservation order?**

[44] The draft order prepared by Ms. Armoyan will include the following changes:

- The court file number should reference only file #1201-65036, which I understand is the file number for the *Matrimonial Property Act* litigation.

- The preamble of the order must indicate that the court has reviewed the affidavit of Ms. McGinty, the undertaking of Ms. Armoyan, and all materials filed in support of the application, in addition to Ms. Armoyan's affidavit.

- The preamble must indicate that the order is based upon the evidence presented on behalf Ms. Armoyan, and without benefit of cross examination, or the presentation of evidence and submissions from Mr. Armoyan.

- The preamble is to include a provision that relief has been granted pursuant to s. 19 of the *Matrimonial Property Act* and Rule 42.

- Mr. Armoyan should be referenced by name and not as "Petitioner."

- Clause 1 of the draft order should reflect that the preservation order affects all real and personal property, both moveable and immoveable, held in Mr. Armoyan's name personally, or as a trustee on behalf of Ms. Armoyan, or as trustee on behalf of any of the children; or held in trust on behalf of Mr. Armoyan, and hereafter referred to as "the assets."

- The word "any" should be removed and replaced with the word "the" in clause 1 (b).

- The words "and/or" should be removed from clause 1 (b) of the draft order and replaced with the word "and."

- The following words are to be added to clause 1(c) after the word "disposing": "mortgaging, charging, pledging, hypothecating, assigning, conveying, or otherwise encumbering the assets in Nova Scotia."

- Clause 2 must be added to stipulate that clause 1 does not impact in any way the enforcement or collection of any judgements, maintenance payments, maintenance arrears, or cost awards due to Ms. Armoyan or the children; nor does it impact on the ability to transfer assets back to Nova Scotia.

- Clause 3 must be added to state the following:

    - Mr. Armoyan, through his counsel, must be forthwith provided with the interim *ex parte* order, and all materials filed in support.

    - Mr. Armoyan may apply for a rehearing of the preservation order by filing a notice in support pursuant to Rule 22. The rehearing will be scheduled forthwith. The rehearing may result in the court setting aside, varying, or continuing the preservation order.

[45] **Conclusion**

[46] The interim *ex parte* preservation order is granted based upon s. 19 of the *Matrimonial Property Act* and Rule 42, and subject to the terms and conditions stated in this decision. A rehearing is contemplated upon Mr. Armoyan filing the requisite notice. The rehearing may result in the court setting aside, varying, or continuing the preservation order.

Forgeron, J.